1		ne Honorable John E. Bridges	
2	Department 3 Noted for Hearing:		
3	Fr	iday, February 4, 2005, 9:00 a.m.	
4			
5			
6			
7	GUDEDIOD COUDT OF WASHINGTO	ALEOD CHELAN COUNTY	
8	SUPERIOR COURT OF WASHINGTO	N FOR CHELAN COUNTY	
9	Timothy Borders, et al,))	
10	Petitioners,) No. 05-2-000027-3	
11	VS.) REPLY MEMORANDUM IN	
12	King County and Dean Logan, et al,) SUPPORT OF KING COUNTY AND) DEAN LOGAN'S MOTION TO	
13	Respondents,) DISMISS)	
14	Washington State Democratic Central Committee,))	
15	Intervenor,))	
16	Libertarian Party of Washington State, and Ruth Bennet Campaign,))	
17	Intervenors.)	
18)	
19	I. INTRODUCTION		
20	The Petitioners have failed to properly plead the election contest proceeding they seek to		
21	commence. The dismissive posture they adopt to wave away the burden of proof required under		
22	RCW 29A.68.070 (misconduct of the election board), and the special pleading requirements of		
23	RCW 29A.68.090 (illegal votes), is no excuse for their misstating many of the County's		
	REPLY MEMORANDUM IN SUPPORT OF KING COUNTY AND DEAN LOGAN'S MOTION TO DISMISS- 1	Norm Maleng, Prosecuting Attorney CIVIL DIVISION E550 King County Courthouse 516 Third Avenue Seattle, Washington 98104 (206) 296-9015/SCAN 667-9015 FAX (206) 296-0191	

arguments, or misreading these statutes. Additionally, the supplemental affidavits of King County electors are not sufficient to cure the fatal flaws in the Petitioners initial filings.

Accordingly, for the reasons set forth below and in King County's original memorandum in support of its motion to dismiss, the County respectfully requests that this matter be dismissed with prejudice.

II. ARGUMENT

A. BECAUSE THEY CANNOT PROVE THAT MS. GREGOIRE DID NOT RECEIVE
THE HIGHEST NUMBER OF LEGITIMATE VOTES, THE PETITIONERS CLAIMS
OF ELECTION BOARD MISCONDUCT UNDER RCW 29A.68.070 MUST BE
DISMISSED.

The Petitioners restate King County's argument as follows: "King County argues that RCW 29A.68.090 requires that the election contest petitioners in this action must prove that the 'irregularity or improper conduct' caused Christine Gregoire to be elected even though she did not receive the highest number of votes." Petitioners' Combined Opposition to Motions to Dismiss ("Petitioners' Response") at page, 7, lns 11-14.

As an initial matter, that is not what the County stated in its brief. Rather, the County argued then (and now) the Petitioners cannot meet their burden of proof under RCW 29A.68.070, not .090. See Memorandum in Support of King County and Dean Logan's Motion to Dismiss at page 7 (citing RCW 29A.68.070 and quoting the entire text of the statute in body of memorandum). That statute provides as follows:

Misconduct of board—Irregularity material to result. No irregularity or improper conduct in the proceedings of any election board or any member of the board amounts to such malconduct as to annul or set aside any election unless the irregularity or improper conduct was such as to procure the person whose right to the office may be contested, to be declared duly elected although the <u>person did not receive the highest number of legal votes</u>.

RCW 29A.68.070. (Emphasis added.)

The Petitioners do not dispute that they cannot prove the person "declared duly elected . . . did not receive the highest number of legal votes." See, e.g., Affidavit of Christopher Vance ("Vance Affidavit") at 7 ("It is apparently impossible to determine which gubernatorial candidate received the greatest number of legitimate votes"). Rather they argue that if the Legislature intended "RCW 29A.68.090 [yet another reference to the wrong statutory provision] and other similar provisions of the election contest statute" to require proof that Ms. Gregoire would have lost and Mr. Rossi would have won, then the statute would only allow for the remedy of declaring Mr. Rossi as having been elected. Petitioners' Respond at 7-8.

However, the Petitioners' broad speculation as to the Legislature's motives are not a substitute for what the Legislature actually said. And in this case, the Legislature has said that when proceeding under RCW 29A.68.070 as a basis for an election contest, the Petitioners must show that Ms. Gregoire did not receive the highest number of legal votes. This proof requirement is clear on its face and no lumping into RCW 29A.68.090 or any category of "other similar provisions" is required.

Moreover, the materiality requirement embodied in RCW 29A.68.070 makes sense given the context in which the statute operates. Election contest boards are defined in chapter 29A.44 RCW. As explained in that chapter, election precinct boards are appointed to monitor proceedings at precinct polling sites. In precincts using paper ballots having two hundred or more registered voters, two sets of boards may be appointed—a counting board and a receiving board. RCW 29A.44.450. The duties of the counting board "shall be the count of ballots cast and return of the election records and supplies to the officer having jurisdiction of the election."

22

23

<u>Id</u>. The duties of the receiving board are to receive and deposit the ballots cast. RCW 29A.44.450, .460.

Within this context of counting boards, receiving boards and paper ballots, the evil addressed by RCW 29A.68.070 is misconduct by one of these boards, or a member thereof, that is intended to "procure" an election victory for a candidate who did not, in fact, receive the highest number of votes. A classic example would be stuffing the ballot box with additional votes in favor of the winning candidate. The statute requires that in order to annul an election for this reason, the contesting party must show that if the additional votes inserted by the board members are removed from the declared winner's total, the winner would no longer have the highest number of legitimate votes.

The Petitioners also rely on <u>Foulkes v. Hayes</u>, 85 Wn.2d 629, 537 P.2d 777 (1975) for the proposition that they need only show error or irregularity that throws the true result of the election "irretrievably in doubt" in order to have it annulled. <u>Foulkes</u> is not on point. In keeping with Petitioners' theme of not focusing on RCW 29A.68.070, that case does not even mention the statute. Rather, <u>Foulkes</u> concerns thirty-year old versions of what is now RCW 29A.68.011 and RCW 29A.68.020.

Accordingly, because the Petitioners admittedly cannot meet their burden of proof to establish an error or irregularity under RCW 29A.68.070, their claims under that statute must be dismissed.

B. <u>PETITIONERS' AFFIDAVITS FAIL TO MEET THE REQUIREMENT IN RCW 29A.68.090 THAT PRECINCTS BE SPECIFIED.</u>

RCW 29A.68.090 states as follows:

Illegal votes—Allegation of. When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that illegal votes were cast, that, if given

23

to the person whose election is contested <u>in the specified precinct or precincts</u>, will, if taken from the person, reduce the number of the person's legal votes below the number of legal votes given to some other person for the same office.

(Emphasis added.)

The Vance Affidavit omits the statutorily required reference to specified precincts¹, stating instead as follows:

Illegitimate, invalid and/or illegal votes were cast, and in such a number that if given to Ms. Gregoire, will, if taken from her, reduce the number of her legal votes below the number of legal votes given to Mr. Rossi (RCW 29A.68.090)[.]

Vance Affidavit at 6, lns 14-17.

In response to King County's argument that the above allegation fails to identify the "specified precinct or precincts in which illegal votes are alleged to have been cast," Petitioners do not seriously dispute that the statute contains this requirement. Rather, they maintain that it does not apply to them because King County allegedly denied them the information they needed in the preliminary and final abstract of votes. They also argue that the "Affidavit of Vance is no longer the only elector affidavit that supports the initiation of this election contest," see, Petitioners' Response at 4, and that the supplemental affidavits they filed are sufficient to meet the statutory requirement. Both of these explanations fail as a matter of law.

1. Petitioners misunderstand the requirements of WAC 434-262-020 and 434-262-030 when they assert they have been denied access to the abstracts of votes.

In asserting that King County refused to give them the information they needed to make the statutorily required allegations, the Petitioners quote extensively from the text of three WAC provisions relating to the preliminary abstract of votes and the auditor's abstract of votes as evidence. It is apparent from their response that Petitioners do not understand these WAC

¹ Note that this deficiency is not limited to King County. Petitioners fail to identify the relevant precinct

provisions because these documents have been available for weeks, as they are required to be prepared <u>prior</u> to certification, which in King County occurred on December 23, 2004.

The preliminary abstract of votes must be prepared following the election and prior to the official canvass. WAC 434-262-020. The auditor's abstract of votes is what the county canvassing board certifies when it certifies the election results. WAC 434-262-070. Petitioners do not actually argue that they did not receive either of these abstracts. Instead, they seem to argue that there is an additional piece to these abstracts that King County was required to but failed to include.

Petitioners appear to misunderstand the portions of WAC 434-262-020 and 434-2626-080 that they emphasize in their response. These portions of the rules require auditors to correct errors or anomalies found in the abstract of votes and to provide a written narrative documenting errors and discrepancies discovered and corrective action taken. The corrective action must be taken prior to the official canvass and must be part of the abstract that is delivered to the Secretary of State immediately after certification. In the case of the 2004 gubernatorial race, if any error or discrepancies were discovered for purposes of WAC 434-262-020 or 434-262-080, they were required to be in the abstract that was completed on December 23, 2004.

Petitioners seem to be confusing the <u>pre</u>-certification preparation of the official auditor's abstract of votes with the <u>post</u>-certification administrative exercise of crediting voters with voting. As explained in further detail in section C.3 below, the post-certification administrative exercise of crediting voters has no bearing on the validity of the election results and its purpose is <u>not</u> to identify or correct errors in the auditor's abstract of votes. In fact, using the administrative exercise of crediting voters to identify errors in the abstract of votes would not make much sense

23

since the crediting of voters takes place <u>after</u> the auditor's abstract of votes is delivered to the Secretary of State.

Petitioners have received the preliminary abstract of votes and the auditor's abstract of votes and their reliance on inapplicable selections from the Washington Administrative Code do not account for failing to comply with the requirements in RCW 29A.68.090 that precincts be specified.

2. <u>Petitioners' supplemental affidavits establish they have all the information they need to meet the specificity requirements of RCW 29A.68.090</u>.

Regardless of whether Petitioners even saw the abstracts discussed above, by their own affidavits, they admit they have the information necessary to specify the precincts in which they believe illegal votes were cast, as required by RCW 29A.68.090.

In their declarations, Christopher Yetter and Julie Sund allege that illegal votes were cast

under the names of 9 deceased persons, that 37 felons illegally voted, and that illegal votes were cast by 30 Washington voters who voted twice. Yetter Declaration at 3, Sund Declaration at 2-4. Mr. Yetter and Ms. Sund explain that they arrived at these figures by comparing information they collected with voter registration lists received from the state and certain counties, including King. They made matches using names and other information such as birth date. <u>Id</u>.

These affidavits clearly demonstrate that Petitioners had the precinct information they were required to plead under RCW 29A.68.090 when they alleged illegal votes were cast in the General Election. Petitioners admit they are making their allegations based on their review of voter registration records. Lists of registered voters made available to the public includes addresses and precinct numbers. WAC 434-324-130. Petitioners failed to use these very same

lists to comply with RCW 29A.68.090 and identify specified precincts from around the state where the alleged illegal voting occurred. Therefore, these claims should be dismissed.

THE AFFIDAVITS FILED BY PETITIONERS IN RESPONSE TO THE COUNTIES' MOTIONS TO DISMISS ARE ON THEIR FACE IRRELEVANT AND IMMATERIAL UNDER RCW 29A.68.011², .020, .070 AND .090.

In their response to King County's Motion to Dismiss, Petitioners state that they "encourage the Court (and the respondents) to focus on the substantive aspects of this contest." Petitioners' position is that neither the Court nor the parties should be forced to deal with "highly collateral and substantively immaterial" issues. Petitioners' Response at 3-4. King County couldn't agree more.

Petitioners have filed and served hundreds of pages of affidavits and attachments that are wholly irrelevant and immaterial to an election contest under RCW 29A.68. While the affidavits may support some of the Petitioners' efforts to discredit election officials and find fault in virtually every process that was undertaken in King County to conduct the November 2, 2004 General Election (even those that met and exceeded statutory requirements), the vast majority of affidavits and the allegations contained therein are not material or even relevant to illegal votes, misconduct or neglect as defined by the election contest statute. (The remaining allegations are insufficient under RCW 29A.68.070 and .090 as previously discussed in sections A and B above.)

1. The rejection of signature update affidavits and declarations by numerous counties, including King, was proper and is immaterial to an election contest.

rules RCW 29A.68.011 applies to this matter, the affidavits are nonetheless insufficient to state a claim

23

under that statute.

Swecker (Thurston County); Josephine Funes Wentzel (Clark County). REPLY MEMORANDUM IN SUPPORT OF KING

REPLY MEMORANDUM IN SUPPORT OF KING COUNTY AND DEAN LOGAN'S MOTION TO DISMISS- 9

Sixteen of the affidavits and declarations submitted by Petitioners in response to the motions to dismiss allege, in whole or in part, errors or misconduct by elections official based on their refusal to accept, for purposes of the November 2, 2004 General Election, late affidavits and declarations with updated signatures from voters whose ballots were rejected due to missing or mismatched signatures.³ Petitioners' argument that these signature update affidavits support their election contest has already been rejected by the Washington Supreme Court.

In *McDonald v. Reed*, the petitioners asked the Washington Supreme Court to direct that during the recount of the gubernatorial race, all ballots should be recanvassed, not just recounted. *McDonald v. Reed*, 103 P.3d 722 (2004). One of the arguments made to support the recanvassing all ballots related to missing and mismatched signatures on provisional and absentee ballots. *McDonald* at 723. State law and rule require that a voter's signature on absentee and provisional ballot envelopes must be the "same as" or "match" the voter's signature contained in the county's voter registration files. RCW 29A.40.110(3); WAC 434-253-047. As the Petitioners in the present case have now done, the petitioners in *McDonald* collected affidavits with updated signatures for numerous voters whose ballots had been rejected due to a missing or mismatched signature. In King County, if the affidavits were submitted <u>prior to the deadline of November 16</u>, the day prior to certification, the voter's signature was updated and his/her ballot was counted if otherwise valid. In *McDonald*, the petitioners argued that updated signatures received after the November 16 deadline should also be applied to the November 2

³ See Affidavits/Declarations of Christopher Hanzeli (King County); Mike Sheridan (King County); Bill Boughton (Douglas County); Thomas Canterbury (Chelan County); David Cummings (Clallam County); Thomas Dent (Grant County); Thomas Huff (Pierce County); Timothy Kovis (Franklin County); Jill Lagergren (Grays Harbor County); Dana Quam (Whatcom County); Fredi Simpson (Chelan County); Travis Sines (Snohomish County); Edel Sokol (Jefferson County); James Stevens (Asotin County); Debra

General Election. The Supreme Court rejected that argument and held that King County's refusal to apply the affidavits received after the deadline was not in error.

We note that the county gave absentee voters who failed to sign their ballot affidavits until 4:30 p.m. on November 16, 2004, the day before certification, to sign and return the affidavits, in accordance with WAC 434-240-235. And although this regulation does not require as much, the county likewise permitted absentee voters with problem signatures until 4:30 p.m. on November 16 to provide an updated signature. The county's procedure for handling signature problems with respect to provisional ballots, which also specified a deadline of 4:30 p.m. on November 16, appears to comport with pertinent regulations and federal law, and petitioners do not persuasively suggest otherwise.

McDonald at 724. Petitioners here apparently intend to base their election contest in part on the same type of late-filed signature updates that the Supreme Court already said King County properly rejected. In light of this Supreme Court opinion, allegations regarding these signature updates cannot, as a matter of law, support an argument for misconduct of election officials under the election contest statute.

2. The affidavits and portions thereof submitted by Petitioners regarding security at the King County election facilities are on their face immaterial and irrelevant to this election contest and should be dismissed as a matter of law.

Petitioners submit affidavits from three individuals who were official Washington State Republican Party ("WSRP") observers in King County. The affidavits of Timothy Borders, Jeffrey Cox and Dan Brady make a variety of largely unsupported and wholly irrelevant and immaterial allegations related to the security of King County's election facilities and the ballots contained therein. This is not first time the WSRP has resorted to pure insinuation and innuendo in an attempt to question the security procedures in King County. As discussed more fully in subsection 2.b. herein, their first attempt was reviewed and rejected by the Washington Supreme Court less than two months ago in a case regarding this same gubernatorial race.

Setting aside for a moment their attempted second bite at this issue, there is no question that their claims regarding securty must be tied to allegations of illegal votes, misconduct or neglect to the degree described in RCW 29A.68. Even under Foulkes v. Hayes, upon which Petitioners rely so heavily, there was at least a specific allegation of tampering, i.e., that votes counted during a recount were marked by someone other than the voter, along with evidence of security lapses. Foulkes, 85 Wn.2d at 630. Petitioners here do not allege that there were any security issues in King County that resulted in ballots being tampered with, ballots being removed or added to the universe of voted ballots, or any other misconduct that might be a proper subject for an election contest. Rather, they unveil several self-serving examples, which, in their opinion, show a lapse in security and then infer that because ballot tampering could have occurred, that it certainly must have occurred in some way, shape or form. Simply put, that is not a sufficient allegation to state a claim under RCW 29A.68. This is further borne out in the specific King County-related affidavits discussed below.

a. Affidavit of Timothy Borders

Timothy Borders alleges that in two instances, King County elections employees were in one of the election facilities without a sheriff's deputy being present. Borders Affidavit at 6-7. Mr. Borders further alleges that the "cage" and the "vault" where King County secured its ballots was not locked at all times, resulting in employees being allowed to "wander" in and out. Border Affidavit at 5. Mr. Borders also alleges that he told election officials that the cage at the Mail Ballot Operations Site (MBOS) was constructed in such a way that a person could climb over the top and the ballots were therefore "insecure." Borders Affidavit at 6.

Even assuming his allegations are true, they are irrelevant and immaterial to this election contest. Mr. Borders does not state that the alleged security issues resulted in or evidenced

ballots being tampered with, illegal votes being counted, or Christine Gregoire being declared governor without receiving the highest number of legal votes.⁴ Nor does Mr. Borders point to any statute or rule that would have been violated if his allegations were true. See e.g., RCW

29A.60.110 (listing security requirements for ballot containers).

Mr. Borders also alleges that the paper stock used for printing ballots in King County was stored outside the cage at the manual recount facility and that the printers used for printing new ballots were located outside the vault at a separate facility several miles away with the only safeguard against unauthorized printing of ballots being a password-protected computer. Mr. Borders' fanciful insinuation that it would be simple for someone to steal the paper stock from the manual recount facility where a sheriff's deputy was posted at the gate to the cage and at the door to the facility and transfer the paper to the Administration Building where he/she could gain access to a confidential computer code and print unauthorized ballots without any elections employees who work in the room noticing is creative, but wholly irrelevant and immaterial to the election contest. Mr. Borders does not allege that any unauthorized printing of ballots took place let alone that such ballots were included within the tally for the governor's race. Mr. Borders allegations, even if true, do not demonstrate that King County's practices with respect to the paper stock were insufficient as a practical matter or as matter of law and they are immaterial and irrelevant to any allegation that ballots were tampered with, illegal votes were counted, or that Christine Gregoire was declared governor without receiving the highest number of legal votes.

20

21

22

23

⁴ Mr. Borders certainly doesn't allege that he scaled the fence and tampered with the ballots, let alone that he actually he saw someone else do so.

b. Affidavit of Dan Brady

Dan Brady's allegations regarding security relate to the level of access the WSRP had to a certain category of ballots called the "NSOF" or "no signature on file" ballots. These ballots were the subject of a lawsuit that the WSRP brought and ultimately lost in the Washington Supreme Court late last year regarding the gubernatorial race at issue in this case. See Washington State Republican Party v. King County Division of Records, 103 P.3d 725 (2004).

Mr. Brady alleges that when the Bill Huennekens, the King County Superintendent of Elections, looked for the NSOF ballots at MBOS, he did not (a) sign the log, (b) tell WSRP observers that he was looking for the ballots and that the ballots would be removed from the cage and transferred to a different facility, and (c) did not invite observers to accompany the ballots to the different facility. Brady Affidavit at 6. These allegations regarding security and access to the NSOF ballots that Mr. Brady now makes are essentially the same allegations that Kenneth Seal made on behalf of the WSRP in WSRP v. King County. See Attachment A. The security allegations were not only rejected by the Pierce County Superior Court (Judge Stephanie Arend crossed out findings related to the allegations from the WSRP's proposed order when she signed it), but they were rejected by the Supreme Court. See Attachment B. See also, Washington State Republican Party v. King County Division of Records, 103 P.3d 725, 727 (2004)("Respondents suggest that . . . the ballots involved might have been tampered with, but point to no facts supporting such a conclusion.").

Even assuming that Mr. Brady's allegations are true and Mr. Huennekens did not sign the log, did not inform the WSRP ahead of time of his plans for the NSOF ballots, and that official party observers did not accompany the NSOF ballots or the 22 poll site ballots when they were transferred to a different facility for processing, the allegations are irrelevant and immaterial to

REPLY MEMORANDUM IN SUPPORT OF KING COUNTY AND DEAN LOGAN'S MOTION TO DISMISS- 13

an election contest under RCW 29A.68.5 Mr. Brady does not allege that Mr. Huennekens or any other election official tampered with the ballots in any way or that the alleged lack of access the WSRP had to the ballots led to illegal votes being counted or to Christine Gregoire being declared governor without receiving the highest number of legal votes. Petitioners do not even allege that any of Mr. Brady's allegations if true, would demonstrate that King County violated any state law or rule. As a matter of law, the allegations do not support an election contest under RCW 29A.68 and should be dismissed.

Affidavit of Jeffrey Cox

Other than repeating some of Mr. Borders' allegations regarding security that are address above, Mr. Cox's only allegation regarding security in King County is that during the machine recount, county officials permitted open bags, coats, and other personal items at or under counting tables. He states that this was not allowed during the manual recount. Cox Affidavit at 6. Mr. Cox does not allege that he saw or even believes that as a result of these personal items in the room during the machine recount, ballots were tampered with, illegal votes were cast, or that Christine Gregoire was declared governor without receiving the highest number of legal votes. Indeed, it is an interesting allegation for the Petitioners to make since their candidate received the highest number of votes at the end of the machine recount.

Setting aside the innuendo and insinuation, Petitioners do not allege that there were any security issues in King County that resulted in, or provide evidence that, ballots were tampered with, illegal votes were cast, or Christine Gregoire being declared governor without receiving

⁵ Additionally, as Mr. Brady is likely aware, the Canvassing Board unanimously rejected 20 of the 22

ballots found at the poll site because the Canvassing Board could not determine with certainty if the ballots were deposited at the polling place before the close of the polls on election day as required by law.

21

19

20

22

23

The 2 ballots that were counted were provisional ballots for which the voters had signed the poll books on election day, clearly indicating that they properly voting the ballots before the polling place closed. REPLY MEMORANDUM IN SUPPORT OF KING COUNTY AND DEAN LOGAN'S MOTION TO DISMISS-14

the highest number of legal votes. Petitioners do not even allege that King County failed to comply with state law or rule with respect any security issues. Petitioners have a right to being an election contest, but they must do it according the election contest statutes. Making factual allegations that are irrelevant and immaterial to the burden they have to meet under the election contest statute is waste of the limited resources of this Court and the government respondents who must respond to this lawsuit while still fulfilling their other statutory duties. The election contest statute requires more than innuendo, and with respect to security issues that is all Petitioners have.

3. A variance between the number of voters credited with voting and the number of ballots cast does not evidence illegal votes or misconduct.

The affidavits submitted by Mike Sheridan, Timothy Borders and Dan Brady attempt to make much of the fact that the number of ballots counted in King County for the 2004 General Election and the number of voters credited with voted in that election, do not match. According to Petitioners, this is true in a number of counties, not just King County. *See* Affidavits of Paul Elvig, Thomas Huff and Mike Sheridan. Even if true this allegation does not demonstrate that illegal votes were cast or that election officials engaged in misconduct, let alone to the degree required by RCW 29A.68. Petitioners misrepresent the purpose of reconciliation and try to use it to prove something that it does not prove.

Petitioners allege that in King County, the variance between the number of ballots counted in the 2004 General Election and the number of voters credited with voting in that election is 1802. While King County does not agree that this is the correct figure, it does agree that there was a variance. That variance has changed over the past several weeks as the process of crediting voters has continued. Even assuming Petitioners' figure of 1802 is correct, they fail

to allege that the variance alone demonstrates that illegal votes were cast or that misconduct under RCW 29A.68, occurred.

Reconciliation or crediting voters is a post-certification administrative exercise that does not bear upon the authenticity of election results. Crediting voters is required by state statute and rule, but it is not required as a part of or prior to the canvass, recount or certification of an election. *See* RCW 29A.44.231; 29A.60.180; WAC 434-253-060. It thus follows that the purpose for crediting voters is to ensure that current voting records are updated and to collect data for <u>future</u>, not <u>past</u> elections. The information is used by political committees who request voter lists, and to determine validation requirements for future levy measures and for initiative and referendum petitions.

The safeguard and accountability measures for ensuring a fair and accurate election are at the front end of an election – at the polls, in the ballot counting centers, and throughout the certification process. This why there are auditing requirements, poll site reconciliation requirements, and observer requirements. These front-end safeguards and accountability measures ensure an open, accurate, fair and transparent election. The existence of a variance after certification does not prove or even suggest that illegal votes were cast. And it certainly does not show neglect or misconduct under RCW 29A.68.

4. The affidavits and portions thereof submitted by Petitioners regarding duplication and enhancement in King County are irrelevant and immaterial to this election contest.

As required by state rule, duplication and enhancement of ballots occurs when for one reason or another, a ballot will not be properly read by the Accuvote machine. *See* WAC 434-261-070. For example, if instead of filling in the oval next to the candidate's name, a voter circles the candidate's name or party, the machine will not record the vote. To ensure the vote is

properly recorded, members of the enhancement and duplication board would darken the appropriate oval so that the voter's intended vote will be recorded by the Accuvote. Another example relates to absentee ballots. The statutorily required instructions on absentee ballots directs voters to correct their mistakes by drawing an "X" over the oval for the unintended candidate and to then fill in the oval for the intended candidate. When the enhancement/duplication board member is presented with this type of corrected ballot, he/she will place removable white correction tape over the unintended oval so the machine will properly record one vote for the intended candidate.

Petitioners allege that observers were not allowed to challenge the required duplications

Petitioners allege that observers were not allowed to challenge the required duplications and enhancements that election workers made, that election workers used black felt tip pens and "white out" for enhancements, that enhancements would often "completely obscure" the original mark made by the voter, and that they thought enhancement and duplication workers were "confused" as to the standards. Petitioners do state how any of these allegations relate to illegal vote being cast or misconduct or neglect. The allegations are irrelevant and immaterial to this election contest and should be dismissed.

The only specific allegations Petitioners make related to enhancements are in the Borders and Cox Affidavits. Mr. Borders alleges that on November 21, 2004, he saw a ballot from precinct 34-1536 where the oval for Rossi was fully filled in and the oval for Gregoire was partially filled in. Mr. Borders alleges that the Superintendent of Elections rejected the vote as an overvote when Mr. Borders thought the "normal procedure" would have been to count the vote for Rossi. Mr. Borders alleges that a similar, but opposite situation occurred in precinct 36-1754 and when he objected to Rossi's oval being covered with removable correction tape, the ballot was sent to the Canvassing Board for a determination. Mr. Borders does not allege that the

REPLY MEMORANDUM IN SUPPORT OF KING COUNTY AND DEAN LOGAN'S MOTION TO DISMISS- 17

fate of the second ballot was any different than that of the first and he does not allege that there was anything illegal about these ballots or that their treatment indicated any misconduct under RCW 29A.68.070.

Mr. Cox alleges that he saw election workers attempt to count a write-in vote for "Ross" as a write-in vote for Dave Ross in the governor's race. Cox objected and the ballot was forwarded to the Canvassing Board for its determination. As Cox admits, the Canvassing Board did what the election worker intended to do and counted the vote as a write-in vote for "Dave Ross" for governor. Mr. Cox does not allege that the Canvassing Board counted an illegal vote or that they engaged in misconduct by doing what they are required by law to do – determine the intent of the voter if at all possible. At most, this allegation demonstrates that Mr. Cox disagrees one of the thousands of decisions the King County Canvassing Board made during the canvass and recounts for the gubernatorial race. He is free to disagree, but that disagreement is not a basis to support an election contest under RCW 29A.68.

The allegations submitted by Petitioners related to enhancement and duplication are insufficient as a matter of law. Petitioners must prove that a specified number of illegal votes were cast or they must prove misconduct as defined by RCW 29A.68.070. The allegations related to duplication and enhancement are irrelevant and immaterial and should be dismissed as a matter of law.

5. <u>Petitioners' other allegations are similarly irrelevant and immaterial and should be</u> dismissed as a matter of law.

Lastly, the Petitioners make a number of other allegations that fail for the same reasons as the allegations discussed above. For example, Mr. Cox alleges that he was asked by WSRP observers to intervene during the manual recount when recount board members deviated from the

REPLY MEMORANDUM IN SUPPORT OF KING COUNTY AND DEAN LOGAN'S MOTION TO DISMISS- 19

rules specifying how stacks of ballots should be counted and compared. Cox Affidavit at 6. However, he does not allege that the deviations resulted in illegal votes or otherwise support an election contest under RCW 29A.68. All three individuals make allegations regarding what they describe as erroneous instructions and lack of uniformity with respect to overvotes during the manual recount. Again, they do not allege this amounted to misconduct or neglect, nor do they allege it resulted in illegal votes being cast. They allege that during the post-certification administrative exercise of crediting voters, they were not given access to lists, not allowed to observe election workers closer than 30 feet, and that they were generally not kept apprised of every activity that was occurring in the elections office related the post-certification exercise of crediting voters. Setting aside the fact that King County was under no obligation to allow WSRP representatives to observe this post-certification exercise or to keep them apprised of what election staff would be doing each day, neither Mr. Borders, Mr. Brady nor Mr. Cox allege that post-certification activities led to illegal votes being counted or amounted to misconduct or neglect.

The above affidavits and portions thereof, are on their face insufficient to support an election contest under RCW 29A.68. Even assuming they are factually accurate, they are irrelevant and immaterial to an election contest under RCW 29A.68 and this Court should do as Petitioners request and dismiss those issues that are "highly collateral and substantively immaterial."

III. CONCLUSION

For the reasons set forth above, Respondents King County and Dean Logan respectfully requests that this election contest be dismissed.

1	DATED this 31st day of January, 2005.
2	NODM MALENC
3	NORM MALENG King County Prosecuting Attorney
4	
5	By:
6	THOMAS KUFFEL, WSBA #20118 Senior Deputy Prosecuting Attorney
7	Attorneys for King County and Dean Logan
8	By:
9	JANINE JOLY, WSBA #27314 Senior Deputy Prosecuting Attorney
10	Attorneys for King County and Dean Logan
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	

REPLY MEMORANDUM IN SUPPORT OF KING COUNTY AND DEAN LOGAN'S MOTION TO DISMISS- 20

Attachment A

a desk in the Northwest corner of the lobby and commenced going through them.

- 4. I went over and asked Huennekens what he was doing. He appeared somewhat agitated which was not his usual demeanor. He stated that he was sorting the ballots by category. He refused to answer any further questions of mine.
- 5. At that moment other observers came into the building, and I took them to their stations at MOBS to explain what was happening with the ballots that were being sorted.
- 6. I saw two Elections Division employees at another table in the MBOS lobby with a mail tray full of ballots in sealed envelopes. I asked them what they were doing, and they said that were counting them.
- 7. When I was finished escorting observers, I went back to find Huennekens. He was in the office and the mail trays of unopened ballots were gone. I was advised by another Elections Division employee that one of the mail trays had been taken to the King County Administration Building where they were going to be put in a vault and the rest were put back in the MBOS vault.
- 8. Elections Division employees explained to me that neither observers nor deputies from the King County Sheriff's Office went with ballots to the King County Administration Building. This was not normal procedure since ballots are always accompanied, when moved to another facility, by a Deputy Sheriff.
 - 9. Later I was given to understand that the ballots that Huennekens was

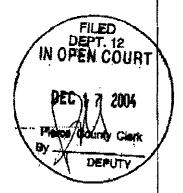
categorizing included the 573 ballots that are at issue in this case.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Executed at <u>Seattle</u>, Washington, this <u>16</u> day of December, 2004.

Kenneth Seal

Attachment B



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

WASHINGTON STATE REPUBLICAN PARTY, an unincorporated association; CHRISTOPHER VANCE, a citizen of Washington State; and JANE MILHANS, a citizen of Pierce County;

Plaintiffs.

KING COUNTY DIVISION OF RECORDS, ELECTIONS AND LICENSING SERVICES; and KING COUNTY CANVASSING BOARD;

Defendants.

No. 04-2-14599-1

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

-PROPOSEDI-

[CLERK'S ACTION REQUIRED]

The Court has reviewed the pleadings and declarations filed in support of Plaintiffs' motion for a temporary restraining order and Defendants' opposition to said motion. It clearly appears to the Court from the facts as shown by the declarations that unless the below Temporary Restraining Order is entered, Plaintiffs will suffer immediate harm and denial of rights that cannot be compensated in damages. There is a significant and continuing risk to Plaintiffs from the harm that may result from Defendants' failure to comply with Washington law as described in the declarations and pleadings on file. The Court is of the view that an order must be issued immediately and that any delay would unduly increase the risk of harm and loss.

TEMPORARY RESTRAINING ORDERIGINAL

Davis Wright Tromsine LLP LAW OFFICES 1600 Century Square - 1801 Fourth Avenus South, Wysbington 20101-1688 (206) 622-3150 - Fex; (206) 628-7689

26 27

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Plaintiffs' counsel has certified to the Court in writing that notice to the defendant was provided.

The Court makes the following findings of fact:

- 1. On November 17, 2004 Secretary of State Sam Reed ("Secretary of State") announced the official results of the November 2, 2004 general election. Dino Rossi won the Governor's race by a margin of 261 votes. Because the margin of victory was fewer than 2000 votes, the Secretary of State ordered a machine recount of the votes in the race for governor. RCW 29A.64.021.
- The votes were retabulated, and Governor-Elect Rossi again prevailed. The Secretary of State certified the results and confirmed on November 30, 2004 that Rossi was the Governor-Elect. RCW 29A.60.250.
- On December 3, 2004, the Washington State Democratic Central
 Committee ("WSDCC") requested a state-wide manual recount. RCW 29A,04.139.
- 4. On December 3, 2004, the WSDCC filed a Petition in the Washington State Supreme Court seeking an emergency relief and an order directing the Secretary of State to promulgate "uniform standards" for the manual recount. The WSDCC sought an order from the Supreme Court requiring that the canvassing boards of all 39 counties in the State of Washington recanvass all ballots previously canvassed and rejected.
- 5. On December 14, 2004, the Supreme Court denied the relief holding that the word "recount" means the process of retabulating ballots and producing amended election returns under RCW 29A.04.139. No. 76321-6. The Supreme Court further held that under Washington law, ballots are to be "retabulated" only if they have been previously counted or tallied. The Supreme Court rejected the position of the WSDCC

that recanvassing of rejected ballots was required under any applicable Washington state statute.

- 6. On or about December 13, 2004, King County Elections Division disclosed that there were at least an additional 520 ballots which had previously been canvassed and rejected and which should now be counted.
- 7. On December 15, 2004, at the Canvassing Board meeting, Dean Logan,
 Director of King County Elections Division, stated that instead of 520 ballots, there were
 573 absentee ballots that had previously been canvassed and rejected prior to November
 17, 2004 because King County could not match the signatures on the absentee ballots with
 any digital voter registration signatures.
- 8.—Logan and Bill Huennskins, King County Elections Supervisor, both stated that the King County Elections Division has already checked the signatures on the absented hallots twice against the database of digital signatures first by an election worker and then by a supervisor.
- 9. Prior to the November 17, 2004 certification, King County Elections

 Division had also sent a letter to more than 1000 absentee voters giving them an opportunity to update their registration signatures. The 573 voters who submitted the rejected ballots at issue did not respond to that letter and as a result, their signatures were never updated in the digital signature files for King County Elections Division.
- rejected in November 2004. While counted ballots were placed in sealed containers and kept in a fenced, locked area as required by statute, rejected ballots were not placed in sealed containers but were kept in open trays. On at least one occasion, the rejected ballots were removed from the fenced, locked area and kept overnight in an open area in open

TEMPORARY RESTRAINING ORDER - 4
SEA 1587561v1 55441-3

Davis Wright Tremaine LLP
LAW OFFICES
1500 Century Square - 1801 Fourth Avesus
5-0-10, Westington 95191-1483
(206) 422-7359 - Past (205) 422-7699

1	
2	
3	para di kacamatan di Kabupatèn Kabupatèn Kabupatèn Kabupatèn Kabupatèn Kabupatèn Kabupatèn Kabupatèn Kabupatèn
4	fourteen (14) days after entry, unless within that time, for good cause shown, it is extended
5	or unless it is superseded by a preliminary or permanent injunction.
6	Issued at 4 p.m., this 17 day of December, 2004, at Seattle, Washington.
8	Acol () () ()
9	Judge/Commissioner
10	Presented by:
11 12	DAVIS WRIGHT TREMAINE Attorneys for Washington Republican Party FILED DEPT. 12 IN OPEN COURT
3	By Harry Korrell, WSBA No. 23173 Robert J. Maguire, WSBA No. 29909
15 16	Aherce Acusta Clerk By DEPUTY
7	By
18	Attorney at Law
9	
20	
21	
22	
23	
24	

26

27